STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 29, 2012
v ROBERT MCCOWAN, Defendant-Appellant.	No. 302398 Wayne Circuit Court LC No. 10-005106-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v LAURA NICHOL, Defendant-Appellant.	No. 302400 Wayne Circuit Court LC No. 10-005106-FC

Before: RONAYNE KRAUSE, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

In Docket No. 302398, defendant, Robert McCowan, appeals as of right his jury trial convictions of armed robbery, MCL 750.529, brandishing a firearm in public, MCL 750.234e, assault and battery, MCL 750.81, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. McCowan was sentenced as a fourth habitual offender, MCL 769.12, to 15 to 30 years' imprisonment for the armed robbery conviction, time served for the brandishing a firearm conviction, time served for the assault and battery conviction, and two years' imprisonment for the felony-firearm conviction. For the reasons set forth in this opinion, we affirm the convictions of defendant McCowan, but remand the matter for resentencing.

In Docket No. 302400, defendant, Laura Nichol, appeals as of right her jury trial convictions of armed robbery, MCL 750.529, and assault and battery, MCL 750.81. Nichol was sentenced to five to 20 years for the armed robbery conviction and time served for the assault and battery conviction. For the reason set forth in this opinion we affirm the convictions and sentences of defendant Nichol.

I. DOCKET NO. 302398.

On appeal, defendant McCowan first argues that it was plain error to admit Detroit Police Sergeant M. Gutierrez's opinion testimony and therefore, reversal is warranted. As McCowan acknowledges, due to his failure to object to the testimony, this Court will review for plain error affecting his substantial rights. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). To establish plain error and avoid forfeiture, defendant must show that: (1) an error occurred; (2) the error was plain; and; (3) the plain error affected defendant's substantial rights. *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001). Generally, to establish that the alleged error affected defendant's substantial rights, prejudice must be shown. *Id*.

Under MRE 402, all relevant evidence is admissible unless otherwise provided by constitution or court rule. *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002). MRE 701 governs the admissibility of opinion testimony by lay witnesses and provides that:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.[1]

This Court has "liberally applied MRE 701 in order to help develop a clearer understanding of facts for the trier of facts." *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988), remanded on other grounds 433 Mich 862 (1989). Lay opinion testimony is admissible when it is not "'overly dependent upon scientific, technical or other specialized knowledge.'" *Id*., quoting *Mitchell v Steward Oldford & Sons, Inc*, 163 Mich App 622, 629-630; 415 NW2d 224 (1987). A police officer may provide lay opinion that is based on his perceptions and is helpful to assist the jury in determining a fact in issue. *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994); *Oliver*, 170 Mich App at 49-50.

McCowan contends that the following testimony by Sergeant Gutierrez constituted inadmissible lay opinion testimony:

> *Q.* And, sir, would it be unusual in your experience as an investigator for someone who has stolen the phone or someone who has received a stolen phone to call numbers on the address book?
>
> *A.* Would it be unusual for them to call?
>
> *Q.* Yes.
>
> *A.* No.

[1] Given that Sergeant Gutierrez did not testify as an expert witness, the issue is whether his testimony constituted admissible lay opinion testimony.

Before such testimony, Rolando Terry's mother, Heather Hernandez, identified several telephone calls made from the stolen cellular telephone. There was also testimony that Hernandez and others received calls from Rolando's cellular telephone after the alleged robbery occurred. Such testimony along with the admitted telephone records demonstrated that there were calls made to individuals known by Hernandez and/or programmed in Rolando's cellular telephone after the robbery. This evidence implicitly undermined Rolando's allegation that the cellular telephone was stolen as one may conclude that Rolando retained the cellular telephone and personally made those calls. Thus, an issue was created surrounding whether the item was stolen. Sergeant Gutierrez's testimony responded to that specific question of fact and helped the jury to determine the origin of the telephone calls. Thus, his testimony was admissible as lay opinion testimony.

McCowan also argues that Sergeant Gutierrez's testimony vouched for, and bolstered, the complainant Rolando Terry's "shaky credibility" since it implied that he believed Rolando's allegation that his cellular telephone was stolen. While Sergeant Gutierrez indicated that it would not be unusual for a thief to call programmed telephone numbers, he did not imply or suggest that it was absolutely true in this case. Thus, Sergeant Gutierrez provided testimony that guided the jury on that ultimate question while leaving it to the jury to assess his testimony and the other circumstantial evidence in reaching its conclusion regarding the source of the telephone calls. Accordingly, defendant McCowan failed to establish that it was plain error to admit Sergeant Gutierrez's opinion testimony at trial.

Alternatively, McCowan argues that he was deprived of his right to the effective assistance of counsel when defense counsel failed to object to Sergeant Gutierrez's opinion testimony and therefore, a new trial is required. Because McCowan failed to move for an evidentiary hearing or a new trial, our review of McCowan's ineffective assistance claim is confined "to errors apparent on the record." *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008); *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). An ineffective assistance of counsel claim "is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error and questions of constitutional law are reviewed de novo. *Id.* at 579.

Decisions to decline to object to procedures, evidence or an argument may fall within sound trial strategy. *Unger*, 278 Mich App at 242, 253. Defense counsel is afforded wide latitude on matters of trial strategy and this Court abstains from reviewing such decisions with the benefit of hindsight. *Id.* at 242-243. As discussed above, Sergeant Gutierrez's testimony was admissible and therefore, defense counsel was not ineffective for failing to make a futile objection. *People v Ericksen*, 288 Mich App 192, 205; 793 NW2d 120 (2010). McCowan also failed to establish that such deficiency affected the outcome of his trial given that sufficient evidence was presented to sustain McCowan's convictions. The record shows that there was testimony by two witnesses, Rolando and Raymond Terry, that McCowan brandished a weapon and that Rolando was attacked and robbed by Nichol and Rachel Lee. An additional witness substantiated the attack and that a robbery occurred. Thus, McCowan failed to establish that even if defense counsel performed deficiently by failing to object to Sergeant Gutierrez's opinion testimony, but for that error, the outcome of his trial would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

McCowan argues that the trial court improperly scored Offense Variables (OVs) 9, 10, 14, and 19, and therefore, this Court should remand for resentencing. We partially agree and remand for resentencing due to the trial court's error in scoring OV 10.

The interpretation and application of sentencing guidelines are reviewed de novo. *People v McGraw*, 484 Mich 120, 123; 771 NW2d 655 (2009). This Court reviews a trial court's scoring of a sentencing variable for clear error. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). "[I]f a minimum sentence falls within the appropriate guidelines range, a defendant is not entitled to be resentenced unless there has been a scoring error or inaccurate information has been relied upon." *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006).

OV 9 pertains to the number of victims associated with the scoring offense. *People v Mann*, 287 Mich App 283, 285; 786 NW2d 876 (2010). In scoring OV 9, "a court is to count each person who was placed in danger of physical injury or loss of life or property during the transaction giving rise to the particular offense as a victim." *People v Harverson*, 291 Mich App 171, 181; 804 NW2d 757 (2010). MCL 777.39, which governs the scoring of OV 9, provides, in relevant part, that the trial court must assess 10 points if two to nine victims "were placed in danger of physical injury or death." As the Supreme Court noted, "in a robbery, the defendant may have robbed only one victim, but scoring OV 9 for multiple victims may nevertheless be appropriate if there were other individuals present at the scene of the robbery who were placed in danger of injury or loss of life." *People v Sargent*, 481 Mich 346, 350 n 2; 750 NW2d 161 (2008).

The record shows that during the events leading up to the robbery, there were four individuals, including Rolando, in close proximity to McCowan when he brandished a gun and threatened Rolando. Further, Raymond recalled that as Dustin Rasnick went toward Nichol to break up the fight, "Lee said that if anyone touches her they're going to get shot." While it appears that Rasnick attempted to stop the attack before Rolando's personal items were taken, an individual nearby someone being robbed, that responds to a call for help, constitutes a person who was "placed in danger of injury or loss of life" by the armed robbery. *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004). "[W]hen scoring OV 9, only people placed in danger of injury or loss of life when the sentencing offense was committed (or, at the most, during the same criminal transaction) should be considered." *Sargent*, 481 Mich at 350. Thus, the trial court did not err in concluding that more than one individual was placed in danger during the criminal transaction and therefore, properly assessed OV 9 at 10 points.

McCowan next argues that the trial court improperly assessed 10 points for OV 10 given that there is no evidence that McCowan exploited Rolando's youth. The prosecutor concurs, and we agree.

"OV 10 relates to the exploitation of a vulnerable victim and is scored at ten points if the offender 'exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status[.]'" *People v Wilkens*, 267 Mich App 728, 742; 705 NW2d 728 (2005), quoting MCL 777.40(1)(b). Under MCL 777.40(3)(c), "vulnerability" is defined as "the readily apparent susceptibility of a victim to

injury, physical restraint, persuasion, or temptation." Further, "exploit" means "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b).

There are several factors to be considered in deciding whether a victim was vulnerable, including: "(1) the victim's physical disability, (2) the victim's mental disability, (3) the victim's youth or agedness, (4) the existence of a domestic relationship, (5) whether the offender abused his or her authority status, (6) whether the offender exploited a victim by his or her difference in size or strength or both, (7) whether the victim was intoxicated or under the influence of drugs, or (8) whether the victim was asleep or unconscious." *People v Cannon*, 481 Mich 152, 158-159; 749 NW2d 257 (2008). The mere existence, however, of one factor "does not automatically render the victim vulnerable." *Id*. at 159. Specifically, age alone is insufficient to support a finding that the defendant "exploited" the youthfulness of the victim within the meaning of MCL 777.40(1)(b). *People v Taylor*, 486 Mich 904; 780 NW2d 833 (2010).

While McCowan exploited Rolando's fear of harm when he brandished his weapon and threatened Rolando, McCowan did not exploit Rolando's youth or size. Initially Rolando fought back when Nichol attacked him but stopped after McCowan threatened him by brandishing his weapon. Therefore, McCowan manipulated his possession of a weapon, not Rolando's youth, while aiding and abetting the battery and the robbery. Further, neither defendant nor the other codefendants approached or initiated the attack because of Rolando's youthfulness. Rolando was targeted because he allegedly "jumped" defendant's son on a previous occasion. Thus, Rolando's age was merely incidental to the commission of the charged crimes. Accordingly, the trial court erred in assessing 10 points for OV 10.

McCowan next argues that OV 14 should have been scored at zero points because there is no evidence that McCowan acted as a "leader" during the incident. OV 14 focuses on the "offender's role" during the entire criminal transaction. MCL 777.44(1). If the defendant was a "leader in a multiple offender situation," ten points is properly assessed under OV 14. MCL 777.44(1)(a). "The entire criminal episode must be evaluated to determine whether a defendant was a leader." MCL 777.44(2)(a); *People v Lockett*, ___ Mich App ___; ___ NW2d ___ (2012)(Docket No. 296747, issued January 10, 2012) (slip op at 8). A trial court does not commit clear error when assessing 10 points where the defendant provided material support to carry out the criminal acts, i.e. provide transportation, a location for the crimes to be committed, and items used during the offense. *Lockett*, ____ Mich App at ____ (slip op at 8-9).

McCowan drove Lee and Nichol to the scene and hovered nearby while Rolando was attacked and robbed. When Rolando responded physically to Nichol's attack, McCowan then threatened harm if Rolando continued such actions. McCowan also brandished his weapon. By threatening Rolando, McCowan ensured that Nichol and Lee were able to continue their attacks on Rolando without any interference from not only Rolando, but presumably from the others present who would have also felt threatened by McCowan's actions. Thus, the trial court did not err in finding that McCowan was a leader during the criminal transaction. While McCowan argues that reasonable inferences could be made that Lee or Nichol were the leaders, if three or more offenders were involved, more than one offender may be determined to have been a leader, thus the fact that either Lee or Nichol served as an additional leader does not negate a finding that McCowan acted as a leader as well. MCL 777.44(2)(b). The trial court did not commit error in assessing 10 points for OV 14.

Lastly, McCowan argues that the trial court erred in scoring OV 19. OV 19 provides that the sentencing court must assess 10 points if the defendant "otherwise interfered with or attempted to interfere with the administration of justice[.]" MCL 777.49(c); *Ericksen*, 288 Mich App at 203. The phrase "interfered with or attempted to interfere with the administration of justice" is broad enough to include acts that constitute an "obstruction of justice" but is not limited to those acts. *People v Barbee*, 470 Mich 283, 287-288; 681 NW2d 348 (2004). Since "[t]he investigation of crime is critical to the administration of justice . . . . [c]onduct that occurs before criminal charges are filed can form the basis for interference, or attempted interference, with the administration of justice," such as providing the police a false name during an investigation. *Id*. at 288. Likewise, hiding or fleeing contrary to proper commands from the police during a criminal investigation constitutes an interference with the administration of justice. Thus, the trial court did not err in concluding that McCowan's action of running into the basement and hiding behind drapes after the police knocked on the door and announced their presence constituted an interference with the administration of justice and appropriately assessed 10 points. Accordingly, the trial court did not err in scoring OV 9, 14, and 19, but we remand for resentencing regarding OV 10 as it was improperly scored at 10 points.

II. DOCKET NO. 302400.

Nichol argues that there is insufficient evidence to prove beyond a reasonable doubt that she committed the charge of armed robbery. In reviewing a sufficiency of the evidence challenge, this Court reviews de novo. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). There is sufficient evidence to sustain a conviction, if after reviewing the evidence in a light most favorable to the prosecution, it is determined that a rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *Wilkens*, 267 Mich App at 738. This Court is "required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). If any conflicts arise while reviewing the record, they must be resolved in favor of the prosecution. *Wilkens*, 267 Mich App at 738.

The elements of armed robbery are: (1) assault, and (2) felonious taking of property from the victim's person or presence (3) while armed with a dangerous weapon. *People v Lee*, 243 Mich App 163, 168; 622 NW2d 71 (2000). Either a completed or an attempted larceny is sufficient to establish the second element of armed robbery. *People v Williams*, 288 Mich App 67, 72-73; 792 NW2d 384 (2010). Armed robbery is a specific intent crime and it is the prosecution's burden to show that the defendant intended to permanently deprive the victim of property. *Lee*, 243 Mich App at 168. One who aids or encourages the completion of a crime can be convicted as if they committed the crime themselves. *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004).

Our review of the evidence leads us to conclude that the testimony elicited during trial demonstrated that Nichol attacked Rolando, punching and striking him, which led to Rolando falling to the ground. While on the ground, Lee went through Rolando's pockets. Rolando and Raymond testified that Lee took money and a cellular telephone from Rolando's pockets. Rolando testified that Lee also took his iPod. Meanwhile, McCowan threatened Rolando and brandished a weapon. Nichol then removed Rolando's diamond earrings from his ears.

Nichol concedes that she attacked Rolando but denies that she took Rolando's earrings or saw a gun during the incident.[2] Nichol argues that there is insufficient evidence because Rolando and Raymond fabricated the robbery and Rolando's allegation that Nichol forcibly removed the diamond earrings from his ears is "simply incredible." Essentially, Nichol is asking this Court to review the decisions of the jury regarding the credibility and the weight of the evidence and it is well-established that, "[t]his Court will not interfere with the jury's role of determining the weight of the evidence or deciding the credibility of the witnesses." *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). While there may have been deficiencies in Rolando's testimony and inconsistencies in his recollection of the incident, "the jury was free to conclude that [Rolando] was nonetheless a credible witness." *Id*. Further, there was sufficient circumstantial evidence for a reasonable jury to conclude that Rolando's earrings were stolen, including testimony that his ears were red after the incident and testimony that Rolando had been previously seen wearing the earrings but not after the incident occurred. Ultimately, the jury weighed the evidence and determined that Nichol participated and furthered the commission of the armed robbery. Accordingly, the prosecution provided sufficient evidence to prove beyond a reasonable doubt that Nichol committed armed robbery.

We affirm the conviction in Docket No 302398 but remand for resentencing. We do not retain jurisdiction. We affirm the convictions and sentences in Docket No. 302400.

/s/ Amy Ronayne Krause
/s/ Henry William Saad
/s/ Stephen L. Borrello

[2]Nichol also argues that she could not aid or encourage Lee to rob Rolando because her attention was "locked on punching" Rolando. However, Nichol admitted to the police that she witnessed Lee "going through the boy's pockets" and a reasonable jury could infer that Nichol was well aware of the actions taken by not only Lee, but also McCowan when he threatened Rolando and brandished the weapon and therefore, she continued to assist during the commission of the armed robbery by attacking Rolando.